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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 40.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellants*,

v.

THE CAPITAL TRANSIT COMPANY, ET AL., *Appellees*.

BRIEF ON BEHALF OF THE STATE CORPORATION COMMISSION OF THE STATE OF VIRGINIA, AND THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICI CURIAE.

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October 11, 1949.

INDEX.

	Page
Opinions Below	1
Preliminary Statement	1
Statement of the Case	2
Statement of Position	5
Summary of the Argument	6
Argument	8
I. The Operations of Capital Transit Are Not Interstate Commerce Within the Meaning of the Term as Intended by Congress When It Enacted Part II of the Interstate Commerce Act.	8
II. Under Section 203(b)(8), Capital Transit is Exempt From Commission Rate Regulation	14
A. The operations of Capital Transit bring that company within the exemption provided by Section 203(b)(8)	14
B. The Commission has failed to make findings of fact adequate to effect removal of Capital Transit from the exemption provided by Section 203(b)(8)	16
C. There is no substantial evidence to support the ultimate finding of fact that continued regulation of Capital Transit is necessary in order to carry out the National Transportation Policy	29
III. Regardless of the Commercial Zone Exemption, the Commission is Without Authority to Prescribe Joint Fares Applicable to Capital Transit	32

Page

A. Capital Transit has not voluntarily established through routes with the Virginia Lines 32

B. Since Capital Transit is primarily a street railway system, the Commission cannot require Capital Transit to establish joint fares with the Virginia Lines 37

(1) *Street railways are specifically exempt from any I. C. C. regulation* 37

(2) *The statutory provisions of Section 216(e), giving the Commission power to require joint rates, do not apply to carriers other than motor carriers* 47

CONCLUSION 50

AUTHORITIES

COURT DECISIONS:

Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193 .....7, 27
Bob-Lo Excursion Co. v. Michigan, 333 U. S. 28.... 18
Capital Transit Co. v. United States, 55 F. Supp. 51 .3, 24
Capital Transit Co. v. United States, Civil Action No. 2496-47 4
City of Yonkers v. United States, 320 U. S. 685..... 28
Colorado Wyoming Gas Co. v. Federal Power Commission, 324 U. S. 626 .....7, 27
Connecticut Light & Power Co. v. Federal Power Commission, 324 U. S. 515 .....6, 14
Cornell Steamboat Co. v. United States, 53 F. Supp. 349 41
Florida v. United States, 282 U. S. 194.....7, 22, 26, 30
Great Northern Ry. Co. v. Department of Public Works (Wash.), 269 P. 142 20
Heitmeyer v. F. C. C., 95 F. (2) 91..... 23
Houston, E. & W. Texas Ry. Co. v. United States (Shreveport Case), 234 U. S. 342.....11, 46
Interstate Commerce Commission v. Parker, 326 U. S. 60 23
Minnesota Rate Cases, 230 U. S. 352..... 18

Page

Missouri Broadcasting Corp. v. F. C. C., 94 F. (2) 623 23
National Labor Relations Board v. Columbian E. & S. Co., 306 U. S. 292 ..... 7, 31
N. Y. Cent. Secur. Corp. v. United States, 287 U. S. 12 49
Omaha & C. B. Street R. Co. v. Interstate Com. Comm., 230 U. S. 324 ..... 7, 37, 38, 39, 40, 42, 43
Palmer v. Massachusetts, 308 U. S. 79 49
Pennsylvania R. Co. v. Public Utilities Commission, 298 U. S. 170 50
Peoples' Fruit and Vegetable Shippers' Assn. v. Commerce Commission (Ill.), 184 N. E. 615 21
Port Richmond Ferry v. Hudson County, 234 U. S. 317 18
Securities and Exchange Com. v. Chenery Corp., 321 U. S. 194 27
Tucker v. Casualty Reciprocal Exchange, 40 F. Supp. 283 10
United States v. Capital Transit Co., 325 U. S. 357 ..... 3, 16, 25, 33
United States v. Carolina Fr. Carriers Corp., 315 U. S. 475 28
United States v. Chicago, N. S. & M. R. Co., 288 U. S. 1 ..... 43, 44
United States v. Village of Hubbard, 266 U. S. 474 ..... 37, 41, 43
United States v. Yellow Cab Co., 332 U. S. 218 ..... 6, 12, 35

Interstate Commerce Commission Decisions:

Cancellation of Joint Fares, D. of C. and Nearby Va., 47 M. C. C. 205 4
Depreciation Charges of W. Ry. & E. Co., 85 I. C. C. 126 ..... 7, 39, 43
East South Joint Rates and Routes, Cancellation, 44 M. C. C. 747 49
Jurisdiction over Urban Electric Lines, 33 I. C. C. 536 42
Kansas City S. Transport Co., Inc., 10 M. C. C. 221. 47
Monon Transportation Corp., Common Carrier Registration Appli., No. MC-28800 46
New England Motor Carrier Rates, 9 M. C. C. 737 ..... 6, 10
Ohio Rates, Fares and Charges, 64 I. C. C. 493 37

Page

Passenger Fares Between D. of C. and Nearby Virginia, (I. C. C. Dkt. No. 28991), 256 I. C. C. 769, 258 I. C. C. 559 ..... 3, 18, 19, 25
Rock Port, L. & N. Ry. Co., 33 M. C. C. 315 48
Sacramento N. Ry., 208 I. C. C. 203 40
Salt Lake & U. R. Co., 214 I. C. C. 717 40
Service Transportation Company Contracts, et al., No. MC-C-265 46
Strickroot v. Detroit & C. Nav. Co., 253 I. C. C. 535 ..... 8, 48
Washington, D. C. Commercial Zone, 3 M. C. C. 243 ..... 7, 15, 16
Waterloo C. F. & N. Ry., 208 I. C. C. 211 40

STATUTES:

Interstate Commerce Act
Section 1 (1) 42
Section 1 (3) 42
Section 1 (22) 38, 40
Section 13 (4) 11
Section 15a 40
Section 15 (3) 40
Section 20a 40
Section 20a (1) 38
Section 202 (a) 9
Section 202 (b) 9
Section 203 (a) (8) 8
Section 203 (a) (10) 6, 8
Section 203 (a) (13) 8, 45
Section 203 (b) (7a) 7, 16, 18, 20, 24, 26
Section 203 (b) (8) 6, 7, 13, 14, 16, 18, 24, 29, 30
Section 204 40
Section 206 (a) 46
Section 216 45
Section 216 (a) 45
Section 216 (c) 47, 49
Section 216 (e) 6, 8, 9, 35, 47
Transportation Act, 1920, Chap. 91, 41 Stat. L. 456. 40
U. S. Code, Title 49 14
Section 303 (b) (7a) 14
Section 303 (b) (8) 14

MISCELLANEOUS: Page

Annotations:
146 A. L. R. 209 ..... 21, 23
73 Law Edition 322 43
Bills;
S. 1629—74th Congress 11, 36
Report (H. R.) No. 1645—74th Congress 6, 11
Congressional Record, Vol. 79, page 5650 et seq. 8, 13, 36, 47
Lewis' Sutherland Statutory Construction (2nd ed.), Vol. II, pages 670-672 41

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OPINIONS BELOW.

The opinion of the statutory three-judge federal district court in the District of Columbia (R. 98) is unreported. The opinions of the Interstate Commerce Commission (R. 48, 125) are reported in 47 M. C. C. 205 and 270 I.C. C. 651.

PRELIMINARY STATEMENT.

The State Corporation Commission of the State of Virginia, hereinafter referred to as the "Virginia Commission," is an agency of state government of the State of Virginia, existing under the provisions of the laws of the State of Virginia and having jurisdiction over motor car-

riers and street railways operating within the State of Virginia.

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as the "Association," is a voluntary organization embracing within its membership the members of the regulatory commissions and boards of the several States of the United States except Delaware.

This brief is filed on behalf of said Association under authority of a resolution adopted by the membership at a meeting held at Savannah, Georgia, on November 17, 1948.

STATEMENT OF THE CASE.

This is an appeal from an order of a statutory three-judge federal district court in the District of Columbia granting a permanent injunction against the enforcement of three orders of the Interstate Commerce Commission (Commission) dated June 22, 1945 and July 7, 1948 in its Docket No. 28991, and May 9, 1947 in its Docket No. MC-C-891.

Docket No. 28991 is a proceeding involving the reasonableness of fares for the transportation of persons between the District of Columbia and the Pentagon Building and other Army and Navy installations in nearby Virginia. The proceeding was instituted in 1943, when the Secretary of War wrote to the Commission complaining of the fares then being charged. At that time physical operations between the District of Columbia and some or all of these Virginia installations were being conducted by three interstate bus lines (Virginia Lines) and the Capital Transit Company (Capital Transit).

The Virginia Lines were: Alexandria, Barcroft & Washington Transit Company (A. B. & W.); Washington, Virginia and Maryland Coach Company, Inc. (W. V. & M.); and Arlington and Fairfax Motor Transportation Company, which has since been acquired by W. V. & M. The passenger service of the Virginia Lines, in question in this

proceeding, consists of motor bus service between downtown points in the District of Columbia, on the one hand, and, on the other, the several Virginia installations.

Capital Transit renders urban street car and motor bus service within the District of Columbia, and between the District of Columbia and several points in nearby Maryland. In 1943, when Docket No. 28991 was instituted, Capital Transit also carried on physical operations between the District of Columbia and the Pentagon under temporary authority from the Commission.

In its initial report and order in Docket No. 28991, issued on January 18, 1944 (256 I. C. C. 769), the Commission ordered a reduction in the fares of the Virginia Lines for service to the Virginia installations. The order also required Capital Transit to enter into joint fare arrangements with the Virginia Lines available to passengers traveling from outlying points in the District of Columbia to the downtown area of the District, where they boarded vehicles operated by the Virginia Lines for transportation to the Virginia installations, and for like travel in the opposite direction.

The order of January 18, 1944 was brought on for review before a three-judge district court in the District of Columbia, and that court set aside the Commission report and order. *Capital Transit Company* v. *United States*, 55 F. Supp. 51. The Commission thereupon reopened the proceeding for further hearing and reconsideration and, on June 12, 1944, entered a supplemental report and order reaffirming its original order. (258 I. C. C. 559) The matter was again brought before the three-judge district court and that court entered a decree setting aside the Commission's supplemental report and order. (56 F. Supp. 670) The lower court ruling was reversed, and the Commission order was sustained, upon appeal to the Supreme Court. *United States* v. *Capital Transit Co.*, 325 U. S. 357.

Thereafter, on June 22, 1945, the Commission entered, in Docket No. 28991, the first of the two Commission orders

in that docket now under attack. A copy of this order was attached to the complaint filed in the district court and marked as Exhibit "A". (R. 11) The order requires the Virginia Lines, according as they participate in transportation of passengers between all points in the District of Columbia and certain points in Arlington County, Virginia, to establish and thereafter maintain and apply fares which shall not exceed $1.60 for 12 one-way trips, equal to 13⅓ cents per one-way trip, including transfer privileges on the street railway and motor bus lines of Capital Transit. Pursuant to this order the Virginia Lines and Capital Transit filed appropriate tariffs giving effect to the Commission order, and the prescribed fares became effective July 15, 1945. Capital Transit entered into two agreements with the Virginia Lines, dated July 30, 1945, and August 9, 1945, providing for division of the joint fare by allowing 7.5 cents to each of the Virginia Lines and 5.83 cents to Capital Transit.

On March 31, 1947, upon expiration of its temporary authority, Capital Transit discontinued physical operations in Virginia. Since then the service in Virginia formerly rendered by Capital Transit has been performed by the Virginia Lines.

On February 26, 1947, as supplemented on March 6, 1947, Capital Transit issued notices, effective April 27 and May 12, respectively, of its cancellation and revocation of its concurrence in the joint rate tariffs filed by the Virginia Lines. The Virginia Lines filed tariffs to become effective on May 12, 1947, designed to cancel the joint fare. After hearing, the notice and the schedules were rejected for filing as being in violation of the Commission's order of June 22, 1945. *Cancellation of Joint Fares, D. of C. and Nearby Va.*, 47 M. C. C. 205, decided on May 9, 1947. (R. 48) The three-judge district court in the District of Columbia enjoined enforcement of this order in its decree of December 8, 1948. *Capital Transit Company* v. *United States*, Civil Action No. 2496-47.

On June 11, 1947, the Public Utilities Commission of the District of Columbia entered an order, effective June 22, 1947, requiring Capital Transit to accept not less than 10 cents out of the joint fare of 13⅓ cents. (Order No. 3209, Formal Case No. 367) A copy of this order was attached to the complaint filed in the district court and marked as Exhibit "G". (R. 60)

In August, 1947, the Virginia Lines filed separate petitions seeking cancellation of the joint fare. Capital Transit filed a supporting statement. On October 6, 1947, these petitions were denied and the proceedings were reopened for further hearing. In reopening the proceedings, the Commission broadened the scope of the investigation to include the issue of the lawfulness for the period on and after June 22, 1947, of the divisions of the joint fare.

The Commission then entered, after hearing, the final order involved herein. This report and order, dated July 7, 1948, raised the joint fare from $1.60 for 12 one-way trips, to $1.92 for 12 one-way trips. (R. 125) The Commission also ordered that, on the division of this joint fare, the Virginia Line receive 9 cents on each ride and Capital Transit 7 cents.

The three-judge district court in the District of Columbia permanently enjoined enforcement of these orders on December 8, 1948. This ruling is now being appealed to this Court.

STATEMENT OF POSITION.

The only interest of the Virginia Commission and the Association in this proceeding is with respect to the jurisdictional implications of the Commission orders. We take no position with respect to the level of rates prescribed or the divisions ordered by the Commission. We sincerely believe that, with respect to Capital Transit, the Commission has exceeded its jurisdiction under the Interstate Commerce Act (Act) and has seriously encroached upon a field of regulation left by Congress to the several States and the District of Columbia.

Accordingly, it is the position of the Association that:

I. The operations of Capital Transit are not interstate commerce within the meaning of the term as intended by Congress when it enacted Part II of the Interstate Commerce Act;

II. Under Section 203 (b) (8), Capital Transit is exempt from Commission rate regulation; and

III. Regardless of the commercial zone exemption, the Commission is without authority to prescribe joint fares applicable to Capital Transit.

SUMMARY OF THE ARGUMENT.

I. (Pages 8 to 14) Capital Transit does not conduct physical operations in Virginia and, accordingly, is not engaged in "interstate commerce" within the statutory definition of the term as contained in Section 203 (a) (10) of the Act. Section 216 (e) of the Act further denies the Commission jurisdiction to regulate in any manner the rate for intrastate transportation for any purpose whatever. The Commission, in the past, has so interpreted Section 216 (e). *New England Motor Carrier Rates*, 9 M. C. C. 737, 738. Congress framed the Act so as to fill in the gap in motor carrier regulation as between States, and to prohibit the extension of federal regulation into the intrastate motor-carrier transportation field. House Report 1645—74th Congress; Cong. Rec. Vol. 79, Part 5, pages 5650-5651. This Court has similarly interpreted the meaning of "interstate commerce" in Congressional enactments in cases involving similar circumstances. *United States* v. *Yellow Cab Co.*, 332 U. S. 218; *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515. The Commission does not have jurisdiction over the operations of Capital Transit.

II. (Pages 14 to 32) The operations of Capital Transit are exempt from Commission rate regulation under Sec-

tion 203 (b) (8) of the Act. The service in question is performed entirely within the Washington, D. C. commercial zone as determined by the Commission in 3 M. C. C. 243. The Commission's determination, under Section 203 (b) (7a), that federal regulation is necessary in order to carry out the national transportation policy, is not supported by adequate findings. There is no finding that the national transportation system is in any way affected nor a finding that the objectives of the national transportation policy can be attained only by federal regulation. In the absence of such finding of essential basic facts, the Commission's order can not be sustained. *Florida* v. *United States*, 282 U. S. 194, 215; *Atchison T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 201; *Colorado Wyoming Gas Co. v. Federal Power Commission*, 324 U. S. 626, 634. But, even assuming that the Commission had made adequate supporting findings, there is, in the record, no substantial evidence upon which such findings could be based. The evidence is to the contrary: hostilities have terminated, and Capital Transit has discontinued physical operations in Virginia. An agency order not supported by substantial evidence is fatally defective. *National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292.

III. (Pages 32 to 50). Regardless of the commercial zone exemption, the Commission is without authority to prescribe joint fares applicable to Captal Transit. Joint fares can be prescribed only where through routes between connecting carriers already exist or are required to be established by lawful order of the Commission. Capital Transit has not voluntarily established through routes with the Virginia Lines; such being maintained now only under compulsion of Commission orders. Capital Transit is a street railway company. *Depreciation Charges of W. Ry. & E. Co.*, 85 I. C. C. 126, and other cases. Street railway companies are not subject to Commission jurisdiction. *Omaha & C. B. Street R. Co. v. Inters. Com. Com'n.*, 230 U. S. 324. Enactments subsequent to the *Omaha case* did

not bring street railways under the rate jurisdiction of the Commission. Up until the instant case the Commission has uniformly distinguished between street railways and interurbans and, relying on the *Omaha case*, has consistently held street railways to be excluded from Commission jurisdiction. The Commission contention that there has been a commingling of street car and bus operations and, as a result, the Commission has been vested with jurisdiction over Capital Transit's street car operations, has no foundation in either fact or law. The definition of "motor vehicle," in Section 203 (a) (13) of the Act, expressly negatives the idea that the Commission can obtain jurisdiction over street cars under Part II of the Act. The statutory provisions of Section 216 (e), giving the Commission power to require joint rates, do not apply to carriers other than motor carriers. 79 Cong. Rec. 5670; *Strickroot* v. *Detroit & C. Nav. Co.*, 253 I. C. C. 535; and other cases.

ARGUMENT.

I.

The Operations of Capital Transit Are Not Interstate Commerce Within the Meaning of the Term as Intended by Congress When It Enacted Part II of the Interstate Commerce Act.

Section 203 (a) (10) of the Interstate Commerce Act reads as follows:

> "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

Section 203 (a) (8) provides that the term "State" means "any of the several States and the District of Columbia." Accordingly, commerce wholly within the District of Columbia is not "interstate commerce."

Section 202 (a) provides:

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce . . . and the regulation of such transportation . . . is hereby vested in the Interstate Commerce Commission."

The meaning of this section is clear and unambiguous. The provisions of Part II of the Act apply to motor carriers engaged in interstate commerce and the regulation of motor carriers engaged in interstate commerce is vested in the Interstate Commerce Commission.

Section 202 (b) of the Act provides:

> "Nothing in this part shall be construed to . . . interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Thus intrastate commerce within the District of Columbia is within the exclusive exercise of the power of regulation by the appropriate agency of the local government of the District of Columbia; namely, the Public Utilities Commission of the District of Columbia.

It logically follows that commerce wholly within the District of Columbia, not being "interstate commerce," does not come within the provisions of this part of the Act and is not subject to Commission regulation.

But Congress did not stop here. In further clear and express language the legislators stated in Section 216 (e):

> "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

The regulation of intrastate commerce was left expressly to the several States. Intrastate commerce within the District of Columbia is, therefore, a matter of local jurisdic-

tion; the Commission being completely without authority to regulate the rates, fares, or charges for such intrastate commerce for any purpose whatever.

The Commission in the instant case is attempting to regulate the rates and operations of Capital Transit as being interstate commerce between the District of Columbia and Virginia. Yet in its order of July 7, 1948, the Commission itself stated:

> "On March 31, 1947, the Transit Company discontinued physical operations in Virginia in connection with the transportation of passengers between points in the District and the Pentagon Building." (R. 126)

Since Capital Transit has discontinued physical operations in Virginia, its transportation service clearly falls outside the statutory definition of interstate commerce, and, accordingly, the Commission is without authority to exercise jurisdiction over Capital Transit's rates, fares, or charges.

The Commission, in the past, has so interpreted the express language of the Act.

In *New England Motor Carrier Rates*, 9 M. C. C. 737, 738, the Commission said:

> "... Under Section 216 (e) of the Motor Carrier Act, 1935, we are without authority to prescribe, or in any manner regulate rates for intrastate transportation to remove discriminations against interstate commerce or for any other purpose. ..."

In *Tucker* v. *Casualty Reciprocal Exchange*, 40 F. Supp. 383, 385, the Court quoted Section 202 (b) as support for the statement that:

> "... The Motor Carrier Act of 1935 is not only a case where Congress does not assume to occupy the entire and exclusive field of transportation by motor carriers, but on the contrary, evidences by explicit language an express intention to leave the intrastate commerce by motor carriers to the control of the several States. ..."

We are deeply concerned to find that the Commission has, in this proceeding, sought to regulate intrastate commerce in the manner described above. The Court will judicially notice the fact that hundreds of motor carriers engaging in interstate commerce, subject to Commission regulation, also engage in intrastate commerce. If the Commission is at liberty, in any case, to require an intrastate carrier to make particular intrastate rates or services available to other carriers' interstate passengers or shippers, then the door is open for almost unlimited federal encroachment in the field of intrastate motor carrier regulation. Such a course is diametrically contrary to the plain and expressed intention of Congress. It is a new and startling doctrine which should be rejected by this Court at the threshold.

This self-evident interpretation of the Act is further supported by a study of the legislative history of the Act. In the House Committee report (H. R. Rept. 1645—74th Congress) to accompany S. 1629—74th Congress, which became the Motor Carrier Act of 1935 (and Part II of the Act), it is stated:

> "S. 1629 fills the gap in motor carrier regulation as between States. . . ."

Further:

> "An amendment has been made by the committee which prohibits the extension of Federal regulation in intrastate transportation as exercised under authority of the decision of the Supreme Court in the *Shreveport case* and of the provisions of section 13 (4) of the Interstate Commerce Act."

The *Shreveport case* (234 U. S. 342) and section 13 (4) of the Act refer to the broad Commission regulatory powers over intrastate railroad transportation. Congress expressly prohibited the extension of federal regulation in a similar manner into the motor carrier field. Such an extension of federal regulation, entirely contrary to the expressed in-

tention of Congress, is what the Commission is attempting to accomplish in the present case. As stated above, such a new and startling doctrine should be rejected by this Court.

Likewise, this Court has held that casual or incidental relationship to interstate transit does not constitute interstate commerce. In *United States* v. *Yellow Cab Co.*, 332 U. S. 218, it was held that when local taxicabs merely convey interstate train passengers between their homes and the railroad station it is not an integral part of interstate transportation. Capital Transit functions in a similar manner in that it transports passengers from their homes to Union Station where such passengers board trains for interstate trips to Alexandria, Virginia, and other interstate destinations in the United States. By analogy to the *Yellow Cab case*, such transportation is only casually or incidentally related to the actual interstate transit. It remains local in nature and is not subject to federal regulation. The service performed by Capital Transit in hauling passengers from their homes to points in the District where such passengers board buses of the Virginia Lines destined to the Pentagon Building is no different from the service performed by Capital Transit in hauling passengers from their homes to Union Station where such passengers board trains destined to Alexandria, Virginia, or other interstate points. Neither is an integral part of the interstate transportation. It therefore follows that if such local transportation is not an integral part of interstate transportation, as was held by the Court in the *Yellow Cab case*, the Commission has no jurisdiction over the operations performed by Capital Transit.

This point is well discussed by the Court in its opinion in the *Yellow Cab case:*

> "These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation 'between any two points within the corporate limits of the City.' None of them serves only railroad passengers, all of them

being required to serve 'every person' within the limits of Chicago. They have no contractual or other arrangement with the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental."

* * * * *

"Here we believe that the common understanding is that a traveler intending to make an interstate rail journey begins his interstate movement when he boards the train at the station and that his journey ends when he disembarks at the station in the city of destination. What happens prior or subsequent to that rail journey, at least in the absence of some special arrangement, is not a constituent part of the interstate movement. The traveler has complete freedom to arrive at or leave the station by taxicab, trolley, bus, subway, elevated train, private automobile, his own two legs, or various other means of conveyance. Taxicab service is thus but one of many that may be used. It is contracted for independently of the railroad journey and may be utilized whenever the traveler so desires. From the standpoints of time and continuity, the taxicab trip may be quite distinct and separate from the interstate journey. To the taxicab driver, it is just another local fare." (Page 230)

The intention of Congress in framing the Motor Carrier Act was to fill "the gap in motor carrier regulation as between States." Interstate Commerce Commission jurisdiction was to complement not duplicate that of the State regulatory bodies. In explaining the purpose of the commercial zone exemption, Section 203 (b) (8) of the Act, Senator Wheeler stated on the floor of the Senate:

"The purpose of this exemption, is to avoid duplication of regulation over bus operations, such as those conducted by street railways." (79 Cong. Rec. 5651)

In similar factual situations arising under the Federal Power Act and involving only *de minimus* interstate elements, this Court has rejected the assertion of federal

jurisdiction which would oust State jurisdiction and transfer to federal jurisdiction the regulation of local companies, which Congress intended to leave in State control. *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 531. Such is the situation in the present case. *De minimus* interstate elements alone exist. The transportation provided by Capital Transit is local in nature and not an integral part of any interstate transit. This Court should reject at the outset, as it did in the *Connecticut case*, any attempt to extend federal regulation into the State regulatory field, such extension being entirely contrary to the express terms of the Act and the intent of Congress in framing the Act.

II.

Under Section 203 (b) (8), Capital Transit is Exempt from Commission Rate Regulation.

A. The operations of Capital Transit bring that company within the exemption provided by Section 203 (b) (8).

Section 203 (b) (8)[1] specifically exempts certain bus op-

[1] All statutory references are to the Interstate Commerce Act unless otherwise indicated. In the U. S. Code, title 49, the section numbers are 100 higher, the above sub-section being found at 49 U. S. C. 303 (b) (8). The pertinent portion of this sub-section, including paragraph (7a) which immediately precedes paragraph (8), reads as follows:

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include * * * (7a) * * * nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipali-

erations, carried on within a so-called commercial zone, from rate regulation by the Commission. The Commission has established such a zone in the Washington, D. C., area. *Washington, D. C. Commercial Zone*, 3 M. C. C. 243. The operations in question of Capital Transit are conducted wholly within that zone.

In order to fall within the exemption it is not sufficient that the operations in question be conducted wholly within the commercial zone. It must also appear "that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction."

Capital Transit fully complies with this condition, since it has complete intrastate rights over its routes within the District of Columbia. There is no controversy on this point and the Commission has made no finding to the contrary. The Commission has found that the Virginia Lines fail to meet this condition. Whether or not that finding is well made, it could have no effect upon the question of jurisdiction of Capital Transit, and the Commission does not contend otherwise.[2]

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ties except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction."

[2] At the time of the 1944 Commission orders in Docket No. 28991, and the court reviews thereof, Capital Transit was rendering interstate service to the Pentagon, but had no intrastate rights in Virginia. Accordingly, in this earlier phase of the case, Capital Transit was not exempt under Section 203 (b) (8). For this reason, this *amicus curiae*, in its briefs in the 1944 proceedings,

B. The Commission has failed to make findings of fact adequate to effect removal of Capital Transit from the exemption provided by Section 203 (b) (8).

The only basis on which the Commission can exercise jurisdiction over Capital Transit, in view of Section 203 (b) (8), is to invoke the provisions of Section 203 (b) (7a) under which, upon the making of proper findings supported by substantial evidence, the exemption provision can be disregarded. The Commission has sought to assert jurisdiction over Capital Transit in this way and, indeed, in no other way.

The power of the Commission to remove the commercial zone exemption, as set forth in Section 203 (b) (7a), is as follows:

> ". . . nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the national transportation policy declared in this Act, shall the provisions of this part apply to: (8) . . . (transportation within commercial zones)."

The recitals which the Commission has made in order to invoke Section 203 (b) (7a), and so exclude Capital Transit from the exemption provision consist of six paragraphs set out in full below.[3] Each paragraph of these recitals has

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did not contend that Capital Transit was then entitled to such exemption. However, with Capital Transit's cessation of physical operations in Virginia in March 1947, the impediment to claiming exemption under Section 203 (b) (8) was immediately removed.

[3] (1) "In the prior reports, acting pursuant to authorization contained in section 203 (b) (7a), we found that aside from any question concerning the commercial zone exemption approved in *Washington, D. C. Commercial Zone*, 3 M. C. C. 243, application of Part II to the transportation here considered was necessary in order to carry out the national transportation policy. This finding was also expressly sustained in *United States* v. *Capital Transit, supra*, pages 361-362. It was predicated primarily upon the view that regulation of the fares in issue was necessary in the interest of national defense and as an aid to the efficient operation of the

been numbered for purposes of identification in this discussion.

The subject matter of these six paragraphs may be classified as follows:

References to certain findings made in the prior reports without any indication that they are being adopted as the present findings of the Commission (paragraphs 1 and 2 of recitals);

A brief and general summary of the testimony of one witness, without any indication that such testimony is found to state the facts (paragraph 3 of recitals);

A legal conclusion to the effect that the national transportation policy "contemplates a national transportation system that will, among other things, meet the needs of national defense, and it applies in peacetime as well as in wartime," without any finding that

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then-existing War and Navy Departments. In the original report it was said, at page 783:

(2) The primary reason set forth by the Departments for the institution of this investigation was the large turnover of employees in the Virginia installations. Is was the thought that the transportation charges were an important underlying cause. The evidence bears out this belief, although, doubtless there are other important causes. The persons using this service, like others who utilize public vehicles, are, for the most part, in a relatively low income class. The record warrants the conclusion that the existing charges are higher than they should reasonably be called upon to bear. It is elementary that value of the service, ability to pay, or what the traffic will bear, are elements properly entering into the fixation of reasonable transportation charges. We know of no reason why that principle is not applicable here.

(3) At the last further hearing, the director of civilian personnel of the Army Department was called as a witness. His testimony was along the same lines as the evidence presented by the Departments at the prior hearings.

(4) Respondents and the District Commission lay emphasis upon the termination of hostilities as establishing that there is no longer any need for the exercise of our regulatory authority. As to this it need only be pointed out that the national transportation policy contemplates a national transportation system that will, among other things, meet the needs of na-

the needs of national defense require Commission regulation in this case (paragraph 4 of recitals);

A discussion of court decisions leading to the legal conclusion that the States are without power to regulate the charges for the interstate transportation here in question, without any finding that lack of State jurisdiction presents a situation where Commission regulation becomes necessary in order to effectuate the national transportation policy (paragraph 5 of recital, except last sentence); and

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tional defense, and it applies in peacetime as well as in wartime.

(5) In the first supplemental report herein, at pages 564-565, it was pointed out that even in the absence of Federal occupancy of the field, the States are without power to regulate the charges for interstate transportation (citing *Minnesota Rate Cases*, 230 U. S. 352, 399-401, and cases there cited). In opposition to this view, the Transit Company cites the recent decision in *Rob-Lo Excursion* v. *Michigan*, 333 U. S. 28. The question there was whether the commerce clause of the constitution of the United States precluded the State of Michigan from prohibiting racial discrimination in the transportation of passengers by vessel from Detroit, Mich., to a nearby island in Canada, used solely for recreation purposes. The Court upheld the State statute, but there is nothing in the opinion to justify the view that the Court intended to reverse the long-standing rule stated in *Minnesota Rate Cases, supra*. Another case relied upon by the Transit Company is *Port Richmond Ferry* v. *Hudson County*, 234 U. S. 317, wherein the Court held that, subject to the paramount authority of Congress over interstate commerce, a State may regulate ferry charges from its shore to the shore of another State, the ferriage not being a part of a longer and continuous transportation. Obviously the circumstances here disclosed are different. Our jurisdiction is therefore clear; first, upon the ground that the commercial zone exemption is not applicable because the Virginia Lines perform only limited intra-District operations; or second, upon the ground that regulation is necessary in order to carry out the national transportation policy; or upon both grounds.

(6) We conclude that continued regulation of all fares in issue is necessary in order to carry out the national transportation policy. The motion of the District Commission is overruled." (Exhibit "L" attached to complaint filed in District Court, Sheets 6-7; 256 I. C. C. 769, 783.)

A finding, in the words of the statute (Section 203 (b) (7a)), that continued regulation of all fares in issue "is necessary in order to carry out the national transportation policy." (Last sentence of paragraph 5, and paragraph 6 of recitals).

We respectfully submit that these recitals, considered individually or together, are entirely inadequate as findings of fact, to sustain the attempted removal of Capital Transit from the exemption accorded to it under Section 203 (b) (8).

Reference to certain findings made in the prior reports are not, and do not purport to be, present findings of fact. They are only a recital of the history of the proceedings completed more than four years ago. The portion of the earlier findings which is quoted in paragraph (2) of the recitals in question (256 I. C. C. 769, 783), was based on a record which was made at hearings which closed on November 9, 1943, more than five years ago.

There is no statement with respect to these references to earlier findings, that the Commission is adopting them as current findings of fact. Nor is there any statement from which it could be implied that the previous findings were being adopted as present findings. This lack of statement or implication is to be contrasted with the Commission's treatment of another aspect of the case—through routes. As to through routes, the Commission has said, in its new order, that "there has been no change in the essential circumstances." (R. 131) No similar statement is made with respect to the necessity of subjecting Capital Transit to regulation in order to carry out the national transportation policy.

A recital that the Commission made certain findings of fact several years ago without a clear indication that those findings were being adopted for current application, and without specific recitals, supported by the present record, to the effect that the early findings are still valid, could not possibly be regarded as having present efficacy. That

would be true, as a general proposition, with respect to any administrative proceeding. It is especially true here because Section 203 (b) (7a), which provides for the removal of the exemption, begins with the words:

> ". . . unless and to the extent that the Commission shall *from time to time* find that such application *is* necessary . . ."[4]

The above-quoted portion of Section 203 (b) (7a) plainly indicates that, in order to remove a carrier from the commercial zone exemption, the finding as to the need of regulation, in order to effectuate the national transportation policy, must be a present finding based on an up-to-date record showing presently-existing conditions. The mere recital of a finding of several years ago, based on a record which is now stale and obviously out-dated in several important respects, wholly fails to meet the statutory standard of findings set up in Section 203 (b) (7a).

Equally ineffective as findings of fact which would support the Commission's attempt to deprive Capital Transit of its commercial zone exemption, is the one-sentence statement (paragraph 3 of footnote 3) to the effect that the testimony of one witness at the latest hearing "was along the same lines as the evidence presented by the Department at the prior hearings." Even if intended as a finding of fact, the statement is too indefinite and general to be so regarded. Plainly, however, the statement does not purport to be a finding of fact. No statement is made that the testimony referred to is accepted by the Commission as true.

Without such a statement, expressly adopting the testimony referred to as a finding of fact, references to such testimony in the report and order of a regulatory commission have no standing as findings. The general rule in this regard was well stated in *Great Northern Ry. Co.* v. *Department of Public Works* (Wash.), 269 P. 142, as follows:

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[4] All italics in this brief are supplied unless otherwise indicated.

". . . The statute (Rem. Comp. Stat. Sec. 10423) requires the department, at the conclusion of the hearing, to 'make and render findings concerning the subject matter and facts inquired into.' This contemplates a statement of the facts found in direct and certain language, sufficiently clear as to leave no misunderstanding as to their meaning and purport. The findings in this instance are not thus direct and certain. Many of them are preceded by such phrases as 'complainant alleges,' 'complainant's witnesses allege,' 'complainant also points out,' 'it was stated,' 'respondent submits,' 'respondent by its witnesses and in the brief argues,' 'testimony submitted by complainant indicates,' and the like, leaving it uncertain whether the department intended to affirm or disaffirm the matters contained in the recitals following the phrases, or intended the matters merely as argument in support of the conclusions reached. It is not objectionable, of course, that the department state the contentions of the parties or arguments used by them which it conceives support or militate against the facts as found by it, but, if uncertainty is to be avoided, these should be separately stated, and not confused one with the other in the findings." (Page 143)

See, also, *People's Fruit and Vegetable Shipper's Association* v. *Commerce Commission* (Ill.) 184 N. E. 615, Annotation in 146 A. L. R. 209, at page 229, citing additional cases.

Those portions of the recitals in question which consist only of legal conclusion obviously cannot be classified as findings of fact. In this category is the statement (Paragraph 4 of footnote 3) that the national transportation policy "contemplates a national transportation system that will, among other things, meet the needs of national defense, and it applies in peacetime as well as in wartime." This is merely the Commission's interpretation of the national transportation policy. It does not purport to be a finding that the needs of national defense require Commission regulation in this case.

In the same category, is the discussion of court decisions leading to the legal conclusion that the States are without power to regulate the charges for the interstate transportation here in question (Paragraph 5 of footnote 3). There is no finding that lack of State jurisdiction in this case presents a situation where Commission regulation becomes necessary in order to effectuate the national transportation policy.

We come then to the only current finding of fact to be found in all six paragraphs of the recitals under examination. This is the finding, set forth at the end of Paragraph (5), and also in Paragraph (6), that continued regulation of all fares in issue "is necessary in order to carry out the national transportation policy."

It will be observed that the quoted words are in the language of Section 203 (b) (7a), with nothing else added. That Section requires that, in order to defeat the exemption, the Commission must find that the application of Part II "is necessary to carry out the national transportation policy declared in this Act . . ." So the Commission repeats those exact words in its report and regards this as compliance with the requirement of the statute.

The inadequacy of this type of finding to support an order of the Interstate Commerce Commission has been generally recognized ever since the decision in *Florida* v. *United States*, 282 U. S. 194. In reversing a Section 13 order of the Commission, the Court there said:

> "In the paragraph, which we have quoted, containing the ultimate finding of the Commission with respect to the unjust discrimination caused by the existing intrastate rates as between persons and localities, there is a concluding clause that the intrastate rates result 'in unjust discrimination against interstate commerce.' This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient to support a statewide order from the standpoint of income, in the absence of supporting findings of fact as to the revenue from the traffic in question." (Page 213)

In *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 64, involving an application for a motor carrier certificate, the Court held that a finding, in the words of the statute, of public convenience and necessity, "must have been based on the proper statutory criteria and must have had the necessary factual findings to support it."

In *Missouri Broadcasting Corp.* v. *FCC*, 94 F(2) 623 (cert. den. 303 U. S. 655), the Court said:

> "A stark finding one way or the other that public interest, convenience and necessity will be served is insufficient." (Page 625)

In *Heitmeyer* v. *FCC*, 95 F(2) 91, the Court passed upon the adequacy of the following agency finding:

> "The Commission is of the opinion, and so found, that the applicant has not made such a showing of his financial responsibility as would justify the Commission in granting the application applied for."

The Court found this finding inadequate, saying:

> "General statements of this kind, following the language of the statute are not sufficient to constitute findings of fact as are contemplated by the Statute." (Page 97)

The well-established rule on this point is aptly stated in an exhaustive annotation appearing in 146 A. L. R. 209, as follows:

> "As a general proposition, it may be stated that the requirement of express findings of fact is not satisfied by statements which describe the material facts solely in the terms used in the governing statute, and that more specific facts must be found, by an administrative authority in support of its determinations, particularly where the governing statute by its terms requires an administrative authority to file a 'full statement in writing of the facts and grounds for its decision as found and given by it,' or to 'make and enter findings of fact concerning the subject matter inquired into and enter its order based thereon.'" (Pages 226-227)

The reason behind the rule above stated is that a reviewing court cannot properly exercise its function upon findings of ultimate fact alone, but also requires findings of the basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow; and that the findings of fact are designed to inform aggrieved parties so as to enable them to prepare intelligently an appeal or other remedy in the courts.

We thus find that, reviewing the only pertinent recitals of the Commission order of July 7, 1948 (footnote 3), and considering those recitals separately or together, the conclusion is inescapable that the Commission failed to make findings of fact adequate to support its attempted removal of Capital Transit from the commercial zone exemption of Section 203 (b) (8).

This is exactly the same error which the Commission made in its very first report and order in this proceeding, and which it later voluntarily corrected by reopening the proceeding and making supplemental findings. In this first report, 256 I. C. C. 769, the only finding which the Commission made in order to remove the exemption of Section 203 (b) (8), as it then applied to the Virginia Lines, was the following sentence: "In any event, we are of the opinion and find that application of the Act to that transportation is, in the language of Section 203 (b) (7a), necessary to carry out the national transportation policy." (Page 776)

On appeal, the three-judge district court referred to this quoted statement, found it insufficient, and set aside the order, saying:

> "The Commission does not say, however, in what respect its order complies with the National Transportation Policy, nor does it make findings to support its general conclusion that its order 'is necessary' to carry out the National Transportation Policy." (55 F. Supp. 51, 54)

"... as the Commission has made no findings to support that conclusion, the order of the Commission should be set aside." (55 F. Supp. 51, 55)

The Commission did not choose to take an appeal from this decision voiding its first order, but, instead, reopened the case for further evidence and findings. Apparently agreeing with the court that the initial findings were inadequate, the Commission said, in its report on reconsideration:

"Where we are convinced that the record upon which the court's determination was reached, or our report, is in need of amplification or clarification, we believe that we may take corrective action and are not restricted to an appeal to the Supreme Court." (258 I. C. C. 559, 562)

The Commission then proceeded to make detailed additional findings tending to support the ultimate conclusion that application of Part II was "necessary to carry out the National Transportation Policy." These additional findings covered the matter of how salary scales in effect at the Government installations; employee-dissatisfaction with transportation charges; the importance in the conduct of the war of the work performed at the Virginia installations, characterizing these buildings as "the nerve center of the war effort in this country"; and the statement that "in order to ensure for the transportation here considered fares that do not exceed a level operating against the full efficiency of the important services performed at the Virginia installations in the conduct of the war, it is essential that the fares be subjected to regulation." (Pages 563-564)

It was these additional findings which were held sufficient by the Supreme Court in *United States* v. *Capital Transit Company*, supra. No similar findings have been made in the July 7, 1948 order, nor could they be made under present conditions known to all. Neither have any other supporting findings been made, however much they might dif-

fer from the findings in 258 I. C. C. 559. The only finding of fact which is made in the present order is the mere recital of the statutory language—a recital which was once before held ineffective by the three-judge court, in which ruling the Commission acquiesced.

There is only one consideration left for discussion in connection with the adequacy of the Commission's findings, under Section 203 (b) (7a), to effectuate the removal of Capital Transit from the commercial zone exemption. That is whether, despite the insufficiency of the findings stated in the Commission's report, the court should, by inference, or by actually going behind the findings and examining the record, supply the omission and thereby validate the order.

The answer to this query is "No". The Supreme Court has repeatedly said that it will neither glean the record to develop findings of its own; nor indulge in presumptions or inferences as a substitute for agency findings. Among the clearest statements to this effect are the following:

> "The question is not merely one of the absence of elaboration or of a suitable complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (Beaumont, S. L. & W. R. Co. v. United States, decided November 24, 1930, 282 U. S. 74 ante, 221, 515 S. Ct. 1), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." (*Florida* v. *United States*, supra, page 215).
>
> "This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a mean-

ing sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. Florida v. United States, 282 U. S. 194, 215, 75 L. ed. 291, 304, 51 S. Ct. 119. Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication." (*Atchison T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, 201).

"... But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. Florida v. United States, 282 U. S. 194, 215, 75 L. ed 291, 304, 51 S Ct 119; United States v. Baltimore & O. R. Co., 293 U S. 454, 464, 79 L. ed 587, 584, 55 S. Ct. 268; United States v. Chicago M. St. P. & P. R. Co., 294 U. S. 499, 504, 505, 510, 511, 79 L ed 1023, 1028, 1029, 1032, 55 S Ct 462; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 488, 489, 86 L ed 971, 982, 62 S Ct 722. Their absence can only clog the administrative function and add to the delays in ratemaking ..."

(*Colorado Wyoming Gas Co.* v. *Federal Power Commission*, 324 U. S. 626, 634.)

"We also emphasized in our prior decision an important corollary of the foregoing rule (a reviewing court must judge the propriety of agency-action solely by the grounds invoked by the agency). If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'we must know what a decision means before the duty becomes ours to say whether it is right or wrong.' United States v. Chicago, M. St. P. & P. R. Co., 294 U. S. 499, 511, 796 L. ed. 1023, 1032, 55 S. Ct. 462." (*Securities and Exchange Commission* v. *Chenery Corp.*, 321 U. S. 194, 196).

> "If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain . . ." (*U. S. v. Carolina Fr. Carriers Corp.*, 315 U. S. 475).

The necessity of the regulatory agency making adequate findings is doubly important in a case such as this where the Commission seeks to enter a domain of regulation which Congress had said shall, under normal circumstances, be left to state and local control. In this connection the decision in *City of Yonkers* v. *United States*, 320 U. S. 685, is particularly apt. In that case the New York Central Railroad Company sought, from the Commission, a certificate entitling it to abandon a certain electric branch line in the State of New York. Section 1 (22) of the Interstate Commerce Act provides that the authority of the Commission over abandonments shall not extend to the abandonment "of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." The Commission, though referring to a number of facts pertaining to the branch line in question, made no findings as to whether this electric branch line was or was not "operated as a part or parts of a general steam railroad system of transportation."

In setting aside the Commission order authorizing the abandonment, the Court said, in part:

> ". . . The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the federal and state domains. Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that

federal power be exercised only where the statutory authority affirmatively appears. The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect (Illinois Commerce Commission v. Thompson, 318 U. S. 675, 87 L. ed. 1075, 63 S. Ct. 834) as by improper findings. The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interests for which Congress expressed its solicitude will be safeguarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.

"We are asked to presume that the Commission, knowing the limit of its authority, considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of Sec. 1 (22). But that is to deal too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.

"This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act." (320 U. S. 685, 691)

C. There is no substantial evidence to support the ultimate finding of fact that continued regulation of Capital Transit fares is necessary in order to carry out the National Transportation Policy.

In the preceding sections of this brief we have argued that, under Section 203 (b) (8), Capital Transit is exempt from Commission regulation unless the Commission makes adequate supporting findings to support its ultimate con-

clusion that continued regulation of Capital Transit fares "is necessary in order to carry out the National Transportation Policy." We have also argued that the Commission has not made such supporting findings and that the courts will not supply the omission by examining the record or indulging in presumptions or inferences. As was said in the *Florida case*, quoted supra, "... the court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

But, even assuming that the Commission had made adequate supporting findings, it is our further position that there is, in the record, no substantial evidence upon which such findings could be based.

This is a point which will presumably be fully developed in the briefs to be filed by the appellees and other parties. Accordingly, we forego an extended discussion of the record. It is sufficient to point out that the circumstances presently existing differ in two very important respects from those shown in the original record which was found sufficient by the Supreme Court. These changed circumstances are: (1) Hostilities have terminated; and (2) Capital Transit has discontinued physical operations in Virginia.

A reading of the original and supplemental reports of the Commission, and of the Supreme Court decision which upheld them, plainly indicates that the removal of the commercial zone exemption afforded by Section 203 (b) (8) was justified chiefly on the ground that effective prosecution of the war required federal regulation. Hostilities have now long since terminated.

The Commission states the legal conclusion that "the national transportation policy contemplates a national transportation system that will, among other things, meet the needs of national defense, and it applies in peacetime as well as in wartime." But there is nothing in the record to show that the peacetime transportation needs cannot be met without federal regulation, and this no doubt accounts

for the fact that the Commission has made no finding to that effect.

The discontinuance, by Capital Transit, of physical operations into Virginia, also undercuts the basic grounds on which Commission jurisdiction was sustained in 1945. The Commission then pointed out that Capital Transit's practice of extending transfer privileges to riders of its own Pentagon buses, created a discrimination which could be corrected only by federal regulation. That discrimination no longer exists. Moreover, aside from the question of discrimination, the necessity of regulating the reasonableness of rates on the Capital Transit buses operating to the Pentagon, was considered as a basis for invoking federal jurisdiction. Today there is no such bus service and no such rates to regulate.

It must be clear that the evidence which would be considered necessary to support an assumption of federal jurisdiction in peacetime, must be more substantial than that which is required in wartime. In all phases of American life in 1944 and the first half of 1945, we were engaged in an all-out war effort, and the niceties of jurisdiction and even of private rights were necessarily given secondary consideration. Whatever the Army and Navy wanted was forthcoming, and neither administrative agencies nor courts were disposed to object. But it would be tragic if that attitude, however necessary in time of war, were permitted to hold over into peacetime and so permanently invade the boundaries of state jurisdiction which Congress intended to protect except under extraordinary circumstances.

Considered in the light of present peacetime conditions, we respectfully urge that there is no substantial evidence to uphold the Commission's disregard of the commercial zone exemption. It is established beyond controversy, of course, that an agency order not supported by substantial evidence is fatally defective. *National Labor Relations Board* v. *Columbian E. & S. Co.*, 306 U. S. 292.

III.

Regardless of the Commercial Zone Exemption, the Commission is Without Authority to Prescribe Joint Fares Applicable to Capital Transit.

Joint fares can be prescribed only where through routes between connecting carriers already exist or are required to be established by lawful order of the Commission. It is our position that the Commission is without power to prescribe joint fares applicable to Capital Transit because: (A) Capital Transit has not voluntarily established through routes with the Virginia Lines; and (B) since Capital Transit is primarily a street railway system, the Commission can not require Capital Transit to establish through routes with the Virginia Lines. These two points are discussed separately below.

A. Capital Transit has not voluntarily established through routes with the Virginia Lines.

Through routes and joint fares between Capital Transit and the Virginia Lines are now being maintained under compulsion of Commission orders. But, since the validity of those orders is the very question in issue in this case, it is necessary to test the Commission's authority in the light of the circumstances that existed prior to those Commission orders, and which would presumably exist today but for those orders.

Those circumstances are as follows: Several thousand persons employed at the Virginia installations reside in the District of Columbia. In the morning, on their way to work, they use the Capital Transit urban mass transportation system in the District to reach the downtown area. Here they disembark from the Capital Transit vehicles and board, at nearby street corners, the vehicles of the Virginia Lines which operate to the Virginia installations. In the evening, this process is reversed. Prior to the Commission orders in question, such passengers paid separate

fares to Capital Transit and the Virginia Lines, and there were no transfer privileges or other joint fare arrangements. Capital Transit has no agreement with the Virginia Lines respecting any phase of this passenger movement and has no knowledge concerning or control over the use which any of its passengers make of the service offered by the Virginia Lines. To Capital Transit, the individual passenger is just another local fare.

At the time of the 1945 Supreme Court decision in *United States* v. *Capital Transit Co.*, supra, there existed the further circumstance that Capital Transit operated a bus line of its own to the Pentagon and accorded to riders on that line, but denied to riders on the other Virginia Lines, transfer privileges to use Capital Transit's urban transportation system within the District of Columbia. This circumstance no longer exists, since Capital Transit discontinued its physical operation to the Pentagon in March, 1947.

The Supreme Court in holding that through routes had voluntarily been established, placed prime reliance upon this circumstance which no longer exists. The Court held, in effect, that Capital Transit had voluntarily established a through route between its urban transportation system and its own bus line to the Pentagon, and that, in order to avoid discrimination, it was necessary that similar through routes be established with the Virginia Lines. (325 U. S. 357, 359, 364)

Since Capital Transit no longer operates a bus line to the Pentagon, this basis for sustaining the Commission's power to prescribe joint fares no longer exists.

The Supreme Court also held, however, that even without regard to the circumstances surrounding the operation of Capital Transit's bus line to the Pentagon, the other facts summarized above indicated that Capital Transit and the Virginia Lines had voluntarily established through routes. On this the Court said:

". . . True, their (commuters to Virginia installations) interstate trip was broken at the District termini of the Virginia buses, when they stepped from one vehicle to another. But in the commonly accepted sense of the transportation concept, their entire trip was interstate. Baltimore & O. S. W. R. Co. v. Settle, 260 U. S. 166, 67 L. ed. 189, 43 S. Ct. 28. And the fact that, except as to Transit, they paid a combination of two rates, one for travel wholly within the District, and the other for travel between the District and Virginia, and the journey from their residences to Virginia and back again was taken in two segments, does not mean that the total interstate trip was not on a 'through route.' Virginia R. Co. v. United States, 272 U. S. 658, 666, 667, 71 L. ed. 463, 468, 469, 47 S. Ct. 222; St. Louis S. W. R. Co. v. United States, 245 U. S. 136, 139, 140, 62 L. ed. 199, 205, 206, 38 S. Ct. 49." (325 U. S. 357, 363)

It is respectfully submitted that this ruling ought now to be reexamined, for the following reasons:

(1) With the elimination of the primary ground upon which the Court relied in holding that through routes had been voluntarily established, as indicated above, the additional ground stated in the portion of the decision quoted above can no longer be regarded as a supplementary ruling of secondary importance, but becomes the only basis upon which the Court can hold that through routes were voluntarily established;

(2) Court decision handed down since the 1945 Capital Transit decision raises a doubt as to the present views of the Court on this point; and

(3) Changed circumstances, developing since 1945 opinion, reveal that the Court ruling if unmodified gives the Commission tremendous power to encroach upon State jurisdiction, wholly out of keeping with the intent and spirit of the Act.

The second and third of these reasons why the Supreme Court ruling on this point ought now to be reexamined will be amplified in the discussion which follows.

In *United States v. Yellow Cab Co., supra,* the Supreme Court in holding that taxicab operations in Chicago were too unrelated to interstate commerce to constitute a part thereof, stated:

> ". . . when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation." (p. 233)

The language of this case, decided since the 1945 Capital Transit decision, certainly draws a much finer and more definite line of demarcation between those local operations not subject to Commission regulation and those operations subject to such regulation than the Commission is attempting to exercise in the present case. In view of the present operations of Capital Transit, and in the light of this more recent Supreme Court decision, a reconsideration of the Commission's power to prescribe joint fares is deemed appropriate.

To uphold the Commission's jurisdiction now in view of the fact that Capital Transit has ceased physical operations into Virginia, would be tantamount to authorization to the Commission to encroach upon State jurisdiction contrary to the intent of the Act. The numerous local transit and motor bus operations throughout the nation that are a leg of an interstate journey could be construed as falling within the scope of this decision. This was not the intent of Congress. The Act expressly states:

> ". . . That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce *or for any other purpose whatever.*" (Sec. 216 (e))

Senator Wheeler, in charge of S. 1629—74th Congress, which became the Motor Carrier Act of 1935, (and Part II of the Act), said on the floor of the Senate on April 15, 1935:

> ". . . An exemption is made, unless the Interstate Commerce Commission finds that the law cannot be made to work without its inclusion to some extent, of the transportation of property locally or between contiguous municipalities or commercial zones, as between New York City and New Jersey, and also, for instance, as between Washington and Alexandria, and other contiguous cities where transportation is regulated by the local governments themselves.
>
> "Transportation of passengers in similar localities or zones, provided the several States having jurisdiction regulate the operation, is also exempted and also casual or occasional or reciprocal transportation . . ." (Cong. Rec. Vol. 79, Part 5, Page 5650)

The area of regulation into which the Commission seeks to embark by its ruling in the present case is not within the bounds of these expressions of the intent of the Act. Analogous situations in other localities would become susceptible to Commission regulation, such encroachment on State jurisdiction being neither desirable nor intended by Congress. As stated by Senator Wheeler:

> "The purpose of this exemption, is to avoid duplication of regulation over bus operations, such as those conducted by street railways." (Cong. Rec. Vol. 79, Part 5, Page 5651)

This threatened invasion of State regulatory jurisdiction, presents a much more alarming picture at the present time than existed at the time of the 1945 decision in the Capital Transit case. Hostilities have terminated. Capital Transit has discontinued physical operations in Virginia. If the 1945 opinion goes unmodified, the Commission will be given tremendous power to encroach upon State jurisdiction, wholly out of keeping with the intent and spirit of the

Act, and unlimited by these two primary considerations, which formed the basis of the 1945 decision.

B. Since Capital Transit is primarily a street railway system, the Commission cannot require Capital Transit to establish through routes with the Virginia Lines.

(1) Street Railway Systems are Specifically Exempt From any I. C. C. Regulation.

The Commission orders under review purport to prescribe fares and joint fares applicable for transportation on the Transit Company's street railway system in the District of Columbia.

In *Omaha & C. B. Street R. Co.* v. *Inters. Com. Com.*, 230 U. S. 324, this Court held that street electric railways engaged in interstate passenger transportation were not comprehended within the meaning of the word "railroad" as used in Section 1 of the Act, and were therefore not subject to Commission jurisdiction. It would seem that the decision in the *Omaha case* would definitely bar any attempt at Commission regulation of the fares of the Transit Company.

In *United States* v. *Village of Hubbard*, 266 U. S. 474, the Court held that an interurban electric railway line approximately 14.5 miles in length, operating between the cities of Youngstown, Ohio, and Sharon, Pennsylvania, passing through the village of Hubbard, Ohio, is a "railroad" within the meaning of the Act, and hence subject to general Commission regulation.[8] In that case, the Court drew a distinction between interurban lines, and street railways which had been held, in the *Omaha* case, not to be "railroads" within the meaning of the Act.

[8] The distances from Youngstown and Sharon to Hubbard are 8.75 miles and 7.18 miles, respectively. The Commission had found that the company operating that line "maintains a regular interurban passenger service every half hour between Youngstown and Sharon." *Ohio Rates, Fares and Charges*, 64 I. C. C. 493, 494.

Capital Transit's street car system is confined almost entirely to the city limits of the District of Columbia. Within the District the street cars operate on public streets and stop from block to block for the purpose of receiving and discharging passengers.

Any contention that Capital Transit is an interurban electric railway cannot possibly be based upon that company's electric railway operations within the District of Columbia. The word "interurban" itself denotes a connection *between* cities, not *within* a city.[6] It is a pure contradiction in terms to characterize a street car line, performing *intra* urban service; as an "interurban" line. It is plain, also, that the same line cannot be both interurban and urban, even for the purposes of the Act, for the Act itself has drawn a distinction between these terms.[7]

Capital Transit's street car operations within the District fall squarely within the category of street railways defined in the *Omaha case* and exempted from Commission jurisdiction. In that case the Court drew a clear distinction between electric lines which were "interurban" and those which were not. There the Court said, at page 336:

> ". . . Street railroads transport passengers from street to street, from ward to ward, from city to suburbs . . .
>
> "But it is said that since 1887, when the Act was passed, a new type of interurban railroad has been developed which, with electricity as a motive power, uses larger cars, and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not here dealing with such a case, but with a company chartered as a street railroad,

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[6] "Interurban—going between, or connecting, cities or towns; as, interurban electric railways." (Webster's New International Dictionary, 2nd Ed. Unabridged.)

[7] In Section 1 (22), the words "street, suburban, or interurban electric railways" are used. The same differentiation is made in Section 20a (1).

doing a street railroad business and hauling no freight."[8]

The Commission has itself held that the predecessor to Capital Transit was a "street railway system" within the meaning of the *Omaha case*, and therefore not subject to Commission jurisdiction. *Depreciation Charges of W. Ry. & E. Co.*, 85 I. C. C. 126, decided in 1923. When that case was decided the Washington Railway & Electric Company, predecessor of Capital Transit, had street car service both within and beyond the District coextensive with the present street car service. In addition, it had street car lines, long since abandoned, extending to Rockville, Maryland, a distance of about 11 miles from the District line; and in another direction, to Laurel, Maryland, a distance of about 14 miles. Yet the Commission, after reviewing the *Omaha* decision, said (85 I. C. C. 126, 129):

> "The facts in the Omaha case are similar to those in the present case. The Washington Railway & Electric Company, together with its subsidiaries, operates a 'local' street railway system which hauls no freight and transports passengers principally 'from street to street' within the City of Washington. As an incident to its street-railway business, it conducts a passenger suburban service into Maryland. We believe this transportation system falls within the class of street railways excluded from the act under the decision in the Omaha case . . ."

Needless to say, there has been no change in the facts r circumstances since 1923 which would warrant the Commission in changing its determination then made, that the redecessor of Capital Transit was a "street railway" exempt from Commission regulation. The only substantial change which has taken place since that time has een in the abandonment of the two long street car lines xtending to Rockville and Laurel, Maryland. There is

[8] See also, the dissenting opinion of Commissioner Patterson, 256 C. C. 769, 787.

thus a much stronger case now for holding this company to be a "street railway" than there was 26 years ago. The Commission has several times said that its "previous decisions relating to the status of the same carrier under a similar exemption provision should not be lightly departed from in the absence of changed conditions . . ." *Salt Lake & U. R. Co.*, 214 I. C. C. 717, 721; *Sacramento N. Ry.*, 208 I. C. C. 203; *Waterloo C. F. & N. Ry.*, 208 I. C. C. 211.

Since the decision in the *Omaha case*, Congress has not enacted any amendments specifically adding street railway to the list of carriers subject to Commission regulation. But it is said that in 1910 and 1920 Congress enacted certain statutes enlarging the jurisdiction of the Commission in certain other respects, but providing that the enlarged powers shall not apply to electric street railways or interurbans.[9] From this the Commission reasons that the spe-

[9] The Act of June 18, 1910, chap. 209, 36 Stat. L. 539, 551, 552, amended Section 15 (3) of the Act to give the Commission enlarged powers respecting the establishment of through routes and joint fares, and provided that "The Commission shall not, however, establish any through route . . . between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character . . ." The other amendments were contained in the Transportation Act, 1920, chap. 91, 41 Stat. L. 456, as follows: Section 422, 41 Stat. L. 488, introduced new Section 15a into the Act, dealing with the determination of a fair return, but excluding "(b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight. . . ." Section 402, amending Section 1 of the Act to give the Commission jurisdiction over extensions and abandonments of lines, excludes, by Section 1 (22), 41 Stat. L. 478, "street, suburban or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." Section 439, which inserts new Section 20a into the Act, concerning the issue of securities, excludes, by paragraph 1, 41 Stat. L. 494, "a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation." Section 204, 41 Stat. L. 460, relating to reimbursement to railroads for deficits during Federal control, excludes "any street or suburban

cific exemption of street railways from the application of these new statutes indicates that Congress understood street railways to be included under the general jurisdiction of the Commission.

To support this reasoning the Commission relied on the *Village of Hubbard case, supra.* In that case, in holding interurban lines subject to Commission jurisdiction, these 1910 and 1920 amendments excepting street railways and interurbans were referred to by the Court as indicating "that Congress did not intend to deny to the Commission the power to regulate interurban railways in other respects." (266 U. S. 474, 480)

It is a rule of statutory construction that where the Congress uses broad sweeping language in an act and at a later point in that act expressly excludes certain subjects for specific purposes, Congress intended those subjects to be included within the broad language for general purposes.[10]

But it is plain that this rule has no application to a case like the instant one, where street railways were held by the Court to be excluded under the terms of the original Act and Congress thereafter specifically excluded them from subsequently enacted provisions enlarging Commission jurisdiction.[11] In such a case, the specific exclusion is noth-

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electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic." Section 209, concerning the guaranty to carriers after the termination of Federal control, excludes, by paragraph (a), 41 Stat. L. 464, "a street or interurban electric railway not under Federal control at the time Federal control terminates, which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic or sale of power." Section 300, which deals with the Labor Board, excludes by paragraph 1, 41 Stat. L. 469, "a street, interurban or suburban electric railway not operating as part of a general steam railroad system of transportation."

[10] Lewis' Sutherland Statutory Construction (2nd ed.) Vol. II, pages 670-672.

[11] When Congress amends or amplifies a general regulatory statute it must be deemed to have known the construction which the courts had placed on the original statutory language. *Cornell Steamboat Co.* v. *U. S.*, 53 F. Supp., 349, 355, affirmed, 321 U. S. 634.

ing more than a device to make sure that street railways, *already excluded from existing provisions of the Act*, are *also* excluded under the new provisions enlarging the Commission's authority in certain respects.

While Congress might have relied on the *Omaha case*, it chose, out of an abundance of caution, to make express exceptions in these new provisions. This did not operate to vest the Commission with *general* jurisdiction over the same carriers—that would be exactly contrary to what Congress desired. Street railways, having been excluded, by the *Omaha* decision, from the general jurisdiction *only* by *specific* provision therefor.

When Congress desired to bring new classes of companies under Commission jurisdiction it knew how to accomplish this—it made specific provision for the inclusion of such new classes.[12] It did so by specific language expressly including the new classes of carriers. After the *Omaha* decision by the United States Supreme Court, Congress was certainly called upon to state in express terms its intention to include "street railways" under the general provisions of the Act, if it had any intention to include them.

Up until the instant case the Commission itself has uniformly distinguished between street railways and interurbans and, relying on the *Omaha case*, has consistently held street railways to be excluded from Commission jurisdiction. Since 1915, interurban electric roads have been required to file with the Commission annual reports of their finances and operations. *Jurisdiction over Urban Electric Lines*, 33 I. C. C. 536. But although that decision came down after the 1910 amendments were effective, it

[12] Express companies, sleeping car companies and pipe line companies were made subject to Commission jurisdiction under the Act of June 29, 1906, 34 Stat. L. 584, Section 1, amending sections 1 (1) and (3) of the Interstate Commerce Act. Telegraph, telephone and cable companies were made subject to Commission jurisdiction under the Act of June 18, 1910, 36 Stat. L. 544, Section 7, amending section 1 (1) of the Interstate Commerce Act.

continued to recognize the *Omaha case* as the law, and excluded street railways from the annual report requirements. 33 I. C. C. 536, 539.

In *Depreciation Charges of W. Ry. & E. Co., supra*, the Commission held the predecessor of Capital Transit to be a "street railway." This decision, which quoted with approval the *Omaha case*, was decided in 1923, after the 1920 amendments were fully effective. In the *Village of Hubbard case, supra*, which was decided in 1925, the Court said, at page 478:

> " . . . the distinction suggested in Omaha & C. B. Street R. Co. v. Interstate Commerce Commission, 230 U. S. 324 . . . , between interurban railroads and urban or suburban street railways, has been carefully observed (by the Commission)."

It is a settled rule of construction that the practical interpretation of an ambiguous or uncertain statute by the executive department charged with its administration or enforcement is entitled to the highest respect, and, though not controlling, if acted upon for a number of years, will not be disturbed except for very cogent and persuasive reasons.[13]

In *United States v. Chicago, N. S. & M. R. Co.*, 288 U. S. 1, the Interstate Commerce Commission, after for years asserting in its annual reports that it did not have jurisdiction over any interurban electric railways, in so far as security regulation under Section 20a was concerned, abruptly claimed such jurisdiction over the Chicago, N. S. & M. R. Co., operating between Chicago and Milwaukee. In upholding a district court decision reversing the Commission, the United States Supreme Court, after calling attention to this long standing record of administrative interpretation, said (page 13):

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[13] See exhaustive annotation in 73 Law Edition 322, supplemented in 84 Law Edition 28.

"With this knowledge of the situation the Commission never, until it requested the Attorney General to institute the present suit, by word or act intimated that the procedure followed by the railroad was illegal or the state regulatory bodies without jurisdiction. It would be difficult indeed to conceive a clearer case of uniform administrative construction of Section 20a as applied to this company. Conceding that the proper classification of the railway is not free from difficulty, all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons. (citing cases)

"The primary responsibility rested upon the Commission to determine whether under the circumstances the railroad was required to procure leave under Section 20a for the issuance of securities. Evidently entertaining serious doubts on this question it has for more than a decade resolved them in favor of the carrier, and the company and its officers have acted in reliance on the administrative tribunal's construction of the statute. At this late day the courts ought not to uphold an application of the law contradictory to this settled administrative interpretation."

The above quoted language by this Court is precisely in point in the instant case. For 35 years the Commission has uniformly held electric street railways to be excluded from its jurisdiction. In 1923 it officially determined, after hearing, that the predecessor to Capital Transit was a street railway not subject to Commission regulation. The Commission has not, up to the time of deciding the instant case, sought to regulate the street railway operations of Capital Transit, or its predecessors, or of any other company whatsoever, in any respect. If there is any ambiguity in the statute relative to Commission jurisdiction over street railways, the Commission has resolved that ambiguity through its uniform administrative interpretation of the Act over a long period of years. As this Court said in *United States* v. *Chicago, N. S. & M. R. Co., supra*, "at this late day the courts ought not to uphold an application

of the law contradictory to this settled administrative interpretation."

The Court will take judicial note of the fact that in the District of Columbia and in all large metropolitan areas, urban transportation systems which, a few years ago, were exclusively street car systems, are now supplemented by bus operations. In most cities, including the District of Columbia, the street car system is still the dominant means of transportation. While the buses and street cars of Capital Transit travel about equal mileage, the street cars produce 62 percent of the revenue. There is, unavoidably, a certain amount of integration between the dominant means of transportation, street cars, and the supplemental newcomer, buses. The Commission, however, proposes to let the tail wag the dog, and to secure jurisdiction of the street car operation by reason of its claimed authority over the bus operation.

First, this theory is objectionable for the same reason that the asserted jurisdiction over street railways is objectionable—it is contrary to the Commission's administrative interpretation of the Act over a long period of time. The Commission first obtained jurisdiction over motor carriers in 1935.[14] But in the years that have transpired since then, this is the first situation in which the Commission has asserted jurisdiction over street railways under the Motor Carrier Act (or any other Act).

Secondly, the Commission obtains its authority to regulate bus fares under Section 216 of the Act. Section 216(a) provides that it shall be the duty of every "common carrier of passengers by *motor vehicle*" to establish, observe, and enforce just and reasonable individual and joint rates, fares, and charges. (Emphasis supplied) The term "motor vehicle," as defined in Section 203(a)(13) of the Act,

[14] The Motor Carrier Act was approved August 9, 1935, and became Part II of the Interstate Commerce Act. Under the Transportation Act of 1940, the designation of Part II by the short title "Motor Carrier Act, 1935" for citation purposes, was amended out.

expressly excludes "any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street railway service." The words "any . . . car operated exclusively on a rail or rails" certainly includes street cars. This is doubly certain when it is noted that the kind of trolley buses excluded from the Act are those "furnishing local passenger transportation similar to street railway service." Here is a clear indication of the Congressional intent that Part II of the Act shall not apply to street railway service or to trolley buses furnishing transportation "similar to street railway service." In the face of that express statutory exemption, there is no warrant for the exercise of jurisdiction over street railways, under Part II, whether by the application of reasoning claimed to be analogous to the *Shreveport* principle, or by any other reasoning.[15]

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[15] In analogous situations the Commission has uniformly recognized that commingling or other interrelation between a carrier subject to a specific kind of regulation and a carrier not subject thereto does not justify the Commission in extending such regulation to the latter carrier. Thus, in *Monon Transportation Corp., Common Carrier Registration Appli.*, No. MC-28800, decided by Division 5 on February 13, 1945, it was held that, since Section 206 (a) of the Act, exempting carriers operating solely within a state, from certificate regulation, relates only to motor carriers, a motor carrier operating within a single state does not lose its exemption privilege merely because it is a subsidiary of a railroad which operates in more than one state. See, also, *Service Transportation Company Contracts, et al.*, No. MC-C-265, decided by Division 2 on March 5, 1945, where it was held that the exception to Section 203 (b) (8), in the case of carriers under a common control, management or arrangement for a continuous carriage to or from a point without the commercial zone, was not applicable to a case where the "common . . . arrangement" was with a private carrier, since private carriers are not subject to general Commission regulation under Part II of the Act.

(2) THE STATUTORY PROVISIONS OF SECTION 216(e),[16] GIVING THE COMMISSION POWER TO REQUIRE THROUGH ROUTES AND JOINT FARES DO NOT APPLY TO CARRIERS OTHER THAN MOTOR CARRIERS.

In explaining the provisions of Section 216(e), Senator Wheeler stated:

> " . . . We had a mandatory provision for through routes and joint rates in the bill, but the shipping interests, the railroads, the brokers, and everybody except the bus lines wanted the mandatory provision taken out, so we took it out in the committee as to everybody except the common carrier bus lines who must make such arrangements with each other." (79 Cong. Rec. 5676)

This certainly leaves no doubt as to the intention of Congress when it enacted Section 216(e).

Section 216(e), it is very apparent, was intended to be interpreted in conjunction with the provisions of Section 216(c).[17]

The Commission in the past has always adhered to this clearcut definition of Congressional intent. In *Kansas City S. Transport Co., Inc.*, 10 M. C. C. 221, the Commission held it had no power to require establishment of

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[16] The pertinent provision of Section 216 (e) reads as follows:

" . . . the Commission shall, whenever deemed by it to be necessary or desirable in the public interest, after hearing, upon complaint or upon its own initiative without a complaint, establish through routes and joint rates, fares, charges, regulations, or practices, *applicable to the transportation of passengers by common carriers by motor vehicle*, or the maxima or minima, or maxima and minima, to be charged, and the terms and conditions under which such through routes shall be operated . . ." (Italics supplied)

[17] The pertinent provision of Section 216 (c) reads as follows:

" . . . common carriers of passengers by motor vehicle *may* establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water . . ." (Italics supplied)

through routes and joint rates between rail and motor carriers.

In *Strickroot* v. *Detroit & C. Nav. Co.*, 253 I. C. C. 535, involving a proposed through route between a motor carrier and a water carrier, the Commission said:

> "... We are without authority under either Part II or Part III of the Act to require defendants to join with complainant in the establishment of through routes and joint rates on this traffic. The provisions of Section 216 (c) of Part II and of Section 305 (b) of Part III of the Act in respect of the establishment of through routes and joint rates between common carriers of property by motor vehicle and common carriers of property by water are permissive, not mandatory. There is no provision that the application of these sections of the act and our jurisdiction are or may be limited or expanded as a result of the past action of the carriers. The voluntary maintenance in the past of through routes and joint rates, partly by motor vehicle and partly by water, does not give us jurisdiction to require their continuance or reestablishment. . . ." (p. 537)

This statement as to through routes and joint rates of motor and water carriers is equally applicable to motor and rail carriers, since both water and rail carriers are excepted from any mandatory provisions for through routes and joint rates in section 216 (c).

In *Rock Port, L. & N. Ry. Co.*, 33 M. C. C. 315, the Commission held that where a company was not subject to rate control, it could not be compelled to observe a joint rate arrangement. The opinion reads:

> ". . . Not being subject to rate control, applicant could not be compelled to observe a joint rate arrangement. In *Tariffs Embracing Motortruck or Wagon Transfer Service*, 91 I. C. C. 539, 548, the Commission said:
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> "'While there is no express prohibition in the act against the publication of joint rates in connection with a common carrier not subject to the act, we have consistently held that the line must be drawn between

> those carriers whose rates and practices we can control and those which we cannot control; and upon this line of reasoning it has ben our ruling that joint rates can not be made between carriers subject to the act and those not subject to the act.'
>
> "Practical administration seems to demand that, where joint rates are on file with us, it is necessary to take jurisdiction over the carriers who participate in such joint rates." (page 318)

In *East South Joint Rates and Routes, Cancellation*, 44 M. C. C. 747, the Commission held that no jurisdiction respecting prescription of through routes was conferred on it by section 216 (c). The Commission continued:

> "We agree with the respondents that the provisions of this section relating to the establishment of through routes and joint rates of motor common carriers of property are permissive only, and that we cannot, under this section, prevent them from closing through routes or *require them to* continue their participation in joint rates." (p. 753)

The conclusion is obvious. Congress intended and the Act expressly provides that the Commission's authority to require through routes and joint rates does not apply to carriers other than motor carriers. Through routes and joint rates as to motor carriers and rail and/or water carriers is permissive, not mandatory, and the Commission is without jurisdiction to require their establishment or continuance. This has also been the Commission's administrative interpretation of the Act over a long period of time.

The Commission, as a body of limited jurisdiction, must find statutory authority for its action. *N. Y. Cent. Secur. Corp.* v. *U. S.*, 287 U. S. 12. This is doubly true where a conflict with State jurisdiction is involved. As this Court said in *Palmer* v. *Massachusetts*, 308 U. S. 79, 84:

> ". . . in construing legislation this court has disfavored inroads by implication on state authority and

> resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress . . ."

This Court aptly summarized the correct view in *Pennsylvania R. Co.* v. *Public Utilities Commission*, 298 U. S. 170, when it said, in rejecting a contention in determining whether railroad transportation, partly by private carrier and partly by common carrier, is subject to Commission regulation under the Act:

> "If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be."

The attempted inroad upon State and local control of street railway lines, implicit in the orders under review, unsupported by express statutory authority and founded upon a new and far-reaching doctrine of implied power, should be rejected by this Court as it has rejected similar attempts in the past.

CONCLUSION.

The three principal points discussed herein are those most directly affecting the interests of the Virginia Commission and State regulatory commissions generally. For the reasons stated, the judgment below should be affirmed.

Respectfully submitted on behalf of the State Corporation Commission of the State of Virginia and the National Association of Railroad and Utilities Commissioners, amici curiae.

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